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Arnell H. Welchman and Eva B. Welchman v. Merrill J. Wood dba Wood Realty Company and Milo D. Carter : Brief of Appellants

Utah Supreme Court

Victor A. Spencer; Attorney for Plaintiffs and Appellants;

IN THE SUPREME COURT of the STATE OF UTAH

ARNELL H. WELCHMAN and EVA B. WELCHMAN,

Plaintiffs and Appellants,

vs.

MERRILL J. WOOD, d/b/a Wood Realty Company, and MILO D. CARTER,

Defendants and Respondents.

Case No. 8718

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

This is an appeal from a summary judgment dismissing plaintiffs' action for damages for breach of contract or, in the alternative, for restitution of a commission paid to defendants by plaintiffs.

It was felt appropriate, in connection with the review of a summary judgment, to bring up the entire record. Throughout this brief, R indicates pages of the record, and D pages of the deposition published herein (R. 18). Italicized emphasis throughout this brief has been added by appellants.

STATEMENT OF FACTS

Plaintiffs had a pressing need for money, in order to pay debts. They decided to sell their house to raise it (D. 34, 35). Accordingly, they entered into a written listing agreement with defendant Wood on March 8, 1956 (D. 4; R. 31). This listing agreement *did not require a trade of properties.* It provided, in handwriting, "Will exchange for *money,*" and in the fine print on the reverse side was the provision, ". . . *If I agree* to an exchange of said property, . . ." (R. 31).

Wood assigned his salesman, defendant Carter, to seek a buyer (R. 9; D. 15). Defendants did not present plaintiffs with any offer until April 28, 1956. On that day Carter came to plaintiffs with an offer from a couple by the name of Granger to exchange their residence valued at $10,000 for plaintiffs residence valued at $21,000, with the balance, after adjusting equities, to be paid to plaintiffs by Granger's in monthly installments, under a real estate contract (D. 14, 9).

Plaintiffs were at first unwilling to accept Granger's offer because it would not produce the cash that they sorely needed (R. 1; D. 14, 27, 32). Carter assured them

that they would obtain sufficient cash from the transaction because defendants could make available to them $8,600 under an F.H.A. loan on the Granger house, which would result in almost $3,500 net cash for plaintiffs, and defendants could sell their proposed real estate contract with Granger's for at least $4,000 cash (R. 1; D. 14, 15, 16, 26, 27, 35, 36). Plaintiffs expressed concern that defendants might not be able to make available these sums, but Carter assured them that there was nothing to worry about. He discussed the matter with Wood over the phone and *promised* them that these amounts would be forthcoming (R. 1; D. 14, 15, 16, 26, 27, 36, 37).

Solely in reliance upon Carter's representations and promises, and in consideration thereof, plaintiffs agreed with defendants to make the trade with Granger's (R. 1; D. 9, 14, 32, 35, 36, 37, 39). Defendants thereby became entitled to receive a commission of $1,050 from plaintiffs plus an additional commission of almost $500 from Granger's, none of which they would have been entitled to otherwise unless they had produced a buyer who would "exchange for *money*" (R. 1, 31; D. 10, 11, 37). Plaintiffs acting in reliance upon this oral modification completed the transaction with Granger's and subsequently paid the commission to defendants, so that plaintiffs fully performed everything that they agreed to perform under the new agreement (R. 2; D. 10, 11, 12, 32, 37, 39, 42, 43). By completing the trade with the third party, Granger's, plaintiffs materially and irrevocably changed their position.

Defendants failed to make available to plaintiffs any F.H.A. financing, because of a substantial defect in the foundation of the house (Granger's) to be financed, and failed to sell the Granger contract for $4,000, because no one would buy it at that price (R. 2; D. 30, 17, 19, 37). Plaintiffs subsequently suffered direct and proximate damages as a result (R. 2, 3; D. 20-24, 31, 38, 39).

STATEMENT OF POINTS

The pleadings, deposition, exhibit and affidavit on file show that there are genuine issues as to material facts and that defendants are not entitled to judgment, dismissing the action, as a matter of law.

ARGUMENT

The principal question involved in this case comes down to this: Can defendants induce plaintiffs to follow a particular course of action, expressly assume the risk of an unsatisfactory result, reap a windfall thereby, and then, when what they have promised fails to result and plaintiffs are left without the agreed recompense, hide behind the claim that the transaction imposes no enforceable obligations upon them?

The district court entered summary judgment, on motion of defendants, on defendants' theory that plaintiffs are not entitled to damages for the breach of an alleged oral contract, either because no such contract had been made or because, in any event, it is barred by the statute of frauds.

A motion for summary judgment pierces the pleadings; the formal issues presented by the pleadings are not controlling and the court must consider the entire setting of the case and all papers of record. Barron and Holtzoff, Federal Practice and Procedure, (Rules Edition), 3:89, §1236, (citing numerous authorities). Summary judgment is a drastic remedy which the courts are, and should be, reluctant to use. *Holland vs. Columbia Iron Mining Company,* 4 Utah 2d 303; 293 P2d 700, 705 (concurring opinion); *Travelers Indemnity vs. McIntosh,* 112 Cal App 2d 177, 245 P2d 1065 1068. In reviewing a summary judgment, the party against whom it was granted is entitled to have the court consider the evidence and every fair inference fairly arising therefrom in the light most favorable to him. *Morris vs. Farnsworth Motel,* .... Utah ....; 259 P2d 297, 298; *Holland vs. Columbia Iron Mining Co.,* 4 Utah 2d 303; 293 P2d 700, 703 (concurring opinion); *Strauss vs. Strauss,* 90 Cal App 2d 757, 203 P2d 857, 858.

A. A NEW, ORALLY MODIFIED, CONTRACT WAS ENTERED INTO SUBSEQUENT TO THE WRITTEN ONE.

Was a new contract entered into by the parties on April 28, 1956, which modified and, to the extent of such modification, replaced the original written contract of March 8, 1956?

The factual situation is presented supra. It should be stressed that under the former written listing agreement, plaintiffs had no obligation, whatsoever, to contract for an exchange of *properties* with any buyer pro-

duced by defendants. That agreement provided on its face, "Will exchange for *money*" (R. 31), the word "money" having been handwritten. The fine print on the reverse of said listing card specified ". . . *If I agree* to an exchange of said property . . ." Even if the written and printed provisions can be considered to be inconsistent, it is well established that, in such case, the handwriting must prevail. 12 Am. Jur. 797, §253. The verbal modification of April 28th has all the essential elements of contract, as is fully evident in the deposition of plaintiff Arnell H. Welchman (D. 9, 12, 14, 15, 16, 26, 27, 32, 33, 35, 36, 37, 39). But it fails to meet the requirement of the statute that it be in writing.

B. THE NEW CONTRACT CONFERRED ENFORCEABLE RIGHTS UPON PLAINTIFFS, NOTWITHSTANDING THE STATUTE OF FRAUDS.

Does such new agreement, consisting of the original written agreement together with the verbal modifications thereof, confer any legal rights upon plaintiffs, notwithstanding the statute of frauds?

At 12 Am. Jur. 1006, §428, it is stated:

> "It is true that a simple contract completely reduced to writing cannot be contradicted, changed, or modified by parol evidence of what was said and done by the parties to it at the time it was made, because the parties agreed to put the contract in writing and to make the writing part and evidence thereof. The very purpose of the writing is to render the agreement more certain and to exclude parol evidence of it. Neverthe-

less, by the rules of the common law, it is competent for the parties to a simple contract in writing, before any breach of its provisions, altogether to waive, dissolve, or abandon it, or to add to, change, or modify it, or vary or qualify its terms, and thus make it a new one. In the latter case the contract must be proved partly by the written and partly by the subsequent oral contract which has thus been incorporated into, and made part of, the original one. The reason for this seems to be that simple contracts, whether written or otherwise, are, in the absence of a statute changing the rule, of the same dignity in contemplation of law, and therefore the written contract may be changed, modified or waived in whole or in part by a subsequent one, express or implied . . ."

1. ALL PROVISIONS WITHIN THE STATUTE WERE FULLY EXECUTED.

Notwithstanding the foregoing, it is generally true that a contract required by the statute of frauds to be in writing cannot be modified by parol. But there is a well recognized exception to this where the oral modification has been acted upon. At 49 Am. Jur. 617, §306, it is stated:

"Accordingly, in many cases where the agreement as modified has been acted upon, the rights of the parties have been held to be determined by the modified agreement. This is especially true if there has been what amounts to a part performance, or if both parties have governed themselves by the modified agreement. These courts, while recognizing the general principle that an agreement required by the statute of frauds to

be in writing may not be substantially altered by an oral agreement, take the position that *parties may not accept the benefits from such alteration and then claim that the transaction is void.*

"It is said that it cannot be objected that the modification of a written lease within the statute of frauds was by parol, after the modified contract has been executed. Under this rule, a party may defend an action brought against him for breach of the written agreement by showing performance in accordance with the terms of the oral modification; or *the party who has performed according to the oral agreement may recover according to the terms of the oral agreement, or maintain an action in damages for non-performance on the part of the other party, . . .*"

"As to what brings a case within the operation of the rule that an oral modification acted upon is valid, or at least gives rise to enforceable obligations, depends largely upon the facts of the individual case. It may be stated generally that the acts relied upon by the party seeking relief on the oral modification must have been taken by virtue of the oral contract, and under and in pursuance of it . . ."

The Utah statute of frauds, ordinarily applicable, is U.C.A., 1953, 25-5-4:

"In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

". . .

"(5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation."

This statute was construed in *Kerr vs. Hillyard,* 51 Utah 364, 170 P. 981, in which defendant real estate broker was employed by plaintiff as plaintiff's agent to purchase a farm and certain personal property from one Bowman. The parties agreed orally that defendant was to receive as compensation for his services one-half of the personal property, not exceeding $300 in value. Defendant proceeded to negotiate with Bowman and succeeded in making the purchase, obtaining thereby, in addition to the farm, personal property of the value of $850. Defendant failed to remit the excess over $300 to plaintiff, in accordance with the verbal agreement, and claimed that such agreement was void, because oral, under Comp. Laws 1907, §2467, subdiv. 5, as amended by chapter 72, Laws Utah 1909, commonly known as the statute of frauds, which statute is identical with U.C.A., 1953, 25-5-4, supra. This court held, at 170 P. 982:

> "In our opinion the statute relied on has no application here. It is true that the defendant was employed by the plaintiff as his agent to purchase the farm and personal property from Mr. Bowman, and that *the employment falls squarely within the letter of the statute.* The transaction relating to the purchase of the farm and of the personal property was, however, fully executed, and the plaintiff is not suing the defendant to enforce a contract relating to the purchase or sale of real estate. What the plaintiff is seeking by this action is to compel the defendant to comply with his agreement which agreement was not prohibited by statute. That part of the agreement relating to the personal property was not prohibited by the statute, and the only reason

> plaintiff would not be permitted to enforce the same in an action at law, in case the transaction relating to the real estate had remained executory—that is had not been fully executed—would be because it was an inseparable part of the original employment to purchase the farm from Mr. Bowman. When the agreement relating to the purchase of the farm had become fully executed, however, then there was no longer any legal obstacle in the way which would prevent the plaintiff from compelling the defendant to account for the personal property he had received from Mr. Bowman in excess of the $300, which was the amount of his compensation, all of which he had received and retained . . ."

The opinion cites the following authorities, all proceeding upon the theory that the statute of frauds has no application to fully executed contracts, and that matters arising out of executed contracts may be enforced: *Eastham vs. Anderson,* 119 Mass. 526; *Remington vs. Palmer,* 62 N. Y. 31; *Worden vs. Sharp,* 56 Ill. 104; *Root vs. Burt,* 118 Mass. 521; *Reyman vs. Mosher,* 71 Ind.596; *Winters vs. Cherry,* 78 Mo. 344; *Merriman vs. Thompson,* 48 Wash. 500, 93 Pac. 1075, *Orr vs. Perky Invt. Co.,* 65 Wash. 281, 118 Pac. 19, and *Stewart vs. Preston,* 77 Wash. 559, 137 Pac. 993.

The expression "fully executed" perhaps needs some attention. Obviously, the court in *Kerr vs. Hillyard* did not mean that the oral agreement between plaintiff and defendant had been fully executed by defendant. If it had, there would have been no lawsuit. For, although plaintiff did all that was required of him

under the agreement, by executing the transaction with Bowman, defendant had failed to perform his agreement that plaintiff should receive the personal property in excess of $300 in value.

In the case now before this court, plaintiffs have performed all that was required of them under the oral agreement, by executing the transaction with Granger's, as a result of which defendants received their agreed compensation. But defendants have failed to perform their promise that they would, in return, make available for plaintiffs certain sums of cash.

The court in *Kerr* v. *Hillyard* was invoking the principle declared in Williston on Contracts (Revised Edition), vol. II, pp. 1539-40, at §532:

> "It may also be supposed that every part of the contract which is obnoxious to the Statute has been performed. *Under these circumstances even though a contract is not properly termed divisible, the promise for the remaining performance may be enforced.* (Citing many authorities.)"

This general proposition is set forth in the Restatement of Contracts, as follows:

> §219. "If all promises in a contract which are within the Statute are fully performed the performance has the same legal operation as if the Statute had been satisfied."
>
> §221. "Where a contract consists of one or more promises unenforceable because of the Statute, and one or more promises which are not within it, the latter are unenforceable so long as

the former remain unperformed or unenforceable *but no longer*; . . ."

"Comment:

"a. The Section relates to contracts which contain promises that in themselves were from the outset not within the terms of the Statute, but had coupled with them as part of the same contract other terms which were within the Statute. As a contract is an entirety, it is generally true that none of its provisions are enforceable while part are unenforceable, but since non-compliance with the Statute does not prevent the existence of a contract, it is true not only that when all promises within the Statute have been performed the objection disappears, but that if the party entitled to the benefit of performance of such promises is willing to have that portion of the contract abandoned, he may do so . . ."

In the instant case, as in *Kerr vs. Hillyard,* the only promises unperformed are promises relating to personalty (money). The promises relating to realty and to the agents' compensation, required by the statute to be in writing, were completely performed.

It has been argued by defendants here that the decision in *Kerr vs. Hillyard* turns upon, and is only justified by, fraud on the part of the defendant. But a careful examination of the opinion furnishes no basis for such a conclusion—in fact, the term "fraud" does not even appear in the headnotes to the case. Rather, the court based its decision solely upon the fact that plaintiff had fully executed the oral agreement. The controlling law is a rule of *contracts*—not of torts.

Corbin on Contracts (1950 ed.) states the rule as follows, at vol. 2, p. 107, §308:

> "*Performance by the Plaintiff may Make the Defendant's Oral Promise Enforceable.*
>
> "There are numerous cases in which it has been held that if the plaintiff has fully or partly performed his part as provided in a new oral agreement, varying the performance required by a prior written contract, such performance by the plaintiff will make the new oral agreement enforceable against the other party, *even though he too may have promised something different from what the written contract required of him.* It may, as the courts are inclined to say, 'take the oral contract out of the statute.' In cases where this is true, the rights and duties of the parties are, after the substituted performance by the plaintiff, *wholly determined by the oral agreement so far as that differed from the written one,* and the written contract is effectively discharged pro tanto. [Citing Hogan vs. Swayze, 65 Utah 380, 237 P. 1097 (1925).]"

And at pp. 124-8, §313:

> "...
>
> "(1) A contract may consist of a single promise for an executed consideration. The promise may be within the statute; but it is certain that the execution of the consideration is not, for the statute merely prohibits the enforcement of a contract and this is properly applicable only to executory promises. *If the single executory promise is not itself within the statute, it is enforceable; this is true even though the contract was originally bilateral but has become unilateral through full performance of the one prom-*

ise that was within the statute by reason of the character of the performance promised.

"[Where executory promise is within the statute].

"(2) A contract may consist of two promises by A (or one promise of two separate performances) for an executed consideration, one of the promises being within the statute while the other, if it stood alone, would not be. Thus, for $100 paid by B, A promises B to answer for the default of C and also to make an audit of C's accounts. *In such a case, B should be able to enforce the promise of an audit. The consideration for the two promises is one undivided sum, and the contract is called an 'entire' contract.* But the purpose of the statute is fully attained if A is protected from having to pay for the default of C; *and since A has received the entire consideration for both promises, it is not unjust to compel him to perform one of them or to pay damages.*

"In cases of this sort the courts often call the contract a divisible contract; but all that the facts justify is a statement that *the defendant has promised two performances that can easily be distinguished and separated by the court by reference to the agreement itself.* The contract is not divisible in the sense that the plaintiff has given or promised to give a separate and distinct equivalent for each of the two performances promised by the defendant."

2. THE ORAL MODIFICATION WAS ACTED UPON AND IT MAY BE ENFORCED, IN ORDER TO AVOID AN INEQUITABLE RESULT.

The related principle that an oral modification which

has been acted upon is valid, notwithstanding the statute of frauds, is established in Utah in *Bamberger Co., et al vs. Certified Productions, Inc., et al,* 88 Utah 194, 48 P2d 489, affirmed on rehearing 88 Utah 213, 53 P2d 1153, (1935). See also the annotation at 118 A.L.R. 1511, citing this case in support of this proposition.

In that case plaintiffs and the assignor of the corporate defendant entered into a written lease for the letting of certain premises on Main Street in Salt Lake City, for a period of ten years. Subsequently there were supplemental oral agreements to forego rent for a certain period pending the making of required alterations, which agreements modified the original lease. These agreements were acted upon by the corporate defendant, which materially changed its position in reliance upon them. Plaintiffs sued for restitution under the original lease, and when the corporate defendant raised the oral agreements as a defense, plaintiffs claimed that an oral modification of a written lease required by the statute of frauds to be in writing is invalid. The court, speaking through Mr. Justice Wolfe, refuted this contention, stating at 48 P2d 491:

> ". . . As a broad general doctrine, it may be announced that a contract required by the statute of frauds to be in writing cannot be modified by a subsequent oral agreement. At the moment the principle is thus announced, it is immediately subject to many and varied exceptions. *The first great division comes between executory and executed modifications . . .*"

And at 48 P2d 492:

"It is claimed by the corporate defendant in this case that the modified part of the contract was by it performed. Consequently we may proceed immediately to a consideration as to whether an oral modification which has been acted upon is valid. Here again, there is a division of authority. The note in A.L.R. cites in the United States, California, Illinois, Kansas, Minnesota, Mississippi, Nebraska, New York, North Carolina, Ohio, Oregon, Pennsylvania, Washington, and Wisconsin, as states in which it has been held that where an agreement as modified has been acted upon the rights of the parties are to be determined by the modified agreement. As stated by Mr. Justice Cardozo, then justice of the Court of Appeals of New York, in Imperator Realty Co. vs. Tull, 228 N.Y. 447, 127 N.E. 263, 266: 'Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver . . . We need not go into the question of the accuracy of the description . . . The truth is that we are facing a principle more nearly ultimate than either waiver or estoppel, one with roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong . . . The statute of frauds was not intended to offer an asylum of escape from that fundamental principle of justice.'

"We accept this principle. If a party has changed his position by performing an oral modification so that it would be inequitable to permit the other party to found a claim upon the original agreement as unmodified or defeat the former's claim by setting up a defense that performance

was not according to the written contract, after he has induced or consented to the former going forward, the modified agreement should be held valid. We have held in *Kerr vs. Hillyard,* 51 Utah, 364, 170 P. 981, that a contract required to be in writing when fully executed is not within the statute of frauds, although originally oral. Logically, *an oral modification of a contract required to be in writing when such modification is fully executed is taken out of the statute."*

In the instant case plaintiffs made and fully performed the oral modification, pursuant to defendants' representations and inducements. They materially and irrevocably changed their position thereby, resulting in material benefit to defendants, to which benefit defendants otherwise would not have been entitled.

3. DEFENDANTS ARE ESTOPPED TO ASSERT THE STATUTE.

Such circumstances comprise most of the elements of equitable estoppel, which would constitute an *entirely separate and independent* basis of opposition to the statute. Remaining elements of estoppel are present in this case.

Estoppel was discussed in *Kelly vs. Richards,* 95 Utah 560, 83 P2d 731 (1938):

> "It is essential therefore that the representation, whether it arises by words, acts or conduct, must have been of a material fact; that it must have been willfully intended to lead the party setting up the estoppel to act upon it or that there

must have been reasonable grounds and cause to think that because thereof he would change his position or do some act or take some course on faith in the conduct, and that such action results to his detriment if the person sought to be estopped may now repudiate the words *or interpretation* placed upon such conduct. *This does not require an actual intent to defraud* but only that the circumstances and conduct were such as would perpetrate a fraud *or unfair advantage* if the party could now deny what he had induced or suffered another to believe and act upon. It is an essential element of estoppel in pais that the person involving it relied upon the representation or conduct of the other party, was influenced in his own conduct by it, and would not have acted as he did but for the acts of which he now complains. If complainant's act appears to be the result of his own will or judgment, if it does not appear to be the proximate result of the conduct or representations of the adverse party, there is no estoppel. The conduct must of itself have been sufficient to warrant or induce the course of conduct by the party seeking to invoke estoppel and it must have been made for the purpose of inducing such response and action by the complainant. We do not mean that these are all the elements, nor that in every case all must co-exist equally *but some of these elements must be present in every estoppel.*"

As no reply to the answer in the instant case was ordered by the court, such bar to assertion of the statute has not appeared in the pleadings, but it is available, notwithstanding, under our present procedure. U.R.C.P., Rules 7(a), 8(c), (d). In any event, plaintiffs may obtain

the relief to which they are shown to be entitled under the proofs received in the action. U.R.C.P., Rule 54(c) (1).

Defendants here misrepresented a material fact, i.e., that Carter *knew* that they could sell the Granger contract for $4,000 and make available to plaintiffs an $8,600 F.H.A. loan. (D. 14, 15, 16, 27, 36). It may readily be inferred that Carter did *not know* this.

It has been argued that plaintiffs had knowledge of the real fact, but there is nothing in the record to show they were aware that Carter did not have the knowledge he professed to have in regard to the finances. Plaintiffs' knowledge that the money must come from others is not knowledge that the money would not be available. Carter told them that he *knew* it could be done, and they believed him. (D. 14, 27, 34). At page 27, lines 5 through 25, of the desposition appears the following:

"Q. Did you suppose, then, that $8,600 that you hoped to get on refinancing your new home would be based upon F.H.A. approval?

A. That is what we were *informed* it would be, yes.

Q. And you understood that from the beginning?

A. That is what they told us they could do it for.

You see, what happened, on April 28th—Mr. Carter presented it that night — that with the contract money of $4,000 and with the house financed for $8,600, people who are brokers themselves told us what we would obtain would be enough to meet our debts. That was the figure he had *assured* us he could do—that was the

figure he *promised* us he would able to do, he *assured* us, because we were worried.

We asked him a number of times if he was *sure,* and if he wasn't, the way things stand, it would be better not to sell the house.

Be better if we had just given them $500. But he *promised.* As a matter of fact, as I recall, he phoned Mr. Wood that night *to verify the deal to us, — that it would go."*

Defendants intended that this representation be acted upon by plaintiffs, inducing them to change their position. (D. 14, 27, 36, 37). No intent to defraud is required in order to set up an estoppel. *Kelly* v. *Richards,* supra. Plaintiffs materially and irrevocably changed their position, in reliance. (D. 10, 11, 32, 37, 43). They have been damaged and defendants have received unfair advantage, as a result. (R. 2, 3; D. 11, 37).

C. DEFENDANTS ASSUMED THE RISK THAT PERFORMANCE MIGHT BE IMPOSSIBLE.

Does the impossibility of performance by defendants discharge the oral agreement?

The risk that a promised performance may be impossible, because of existing or supervening circumstances, may be assumed by the promissor.

In Williston on Contracts (Revised Student Edition) 908, §1934, it is stated:

"A promise impossible of performance may be binding.

"'A man may contract that a future event shall come to pass over which he has no, or only limited, power.' Sage v. Hampe, 235 U.S. 99, 104, 35 S. Ct. 94, 59 A. Ed. 147. 'If the occurrence of an event which is not within human control is in terms promised, the words are interpreted as a promise to be answerable for proximate harm unless the event occurs.' Rest., Contracts, §457, Comment b. Not only may such a promise be binding in case of supervening impossibility but it also may be binding though performance was impossible when the promise was made. Indeed, such promises are common. . . ."

The risk of impossibility was assumed by defendants here, as is stated at page 27 of the deposition, quoted supra, and at pages 15 and 16 of the deposition, as follows:

"Q. Now, knowing that he was not in the finance business, did you suppose that Mr. Carter could guarantee that he would be able to sell the equity that you had in the contract for any specific sum?

A. *He assured us he could. He said there was no worry.*

Q. I didn't ask you quite that question. I asked you if you believed, knowing that he was not in the finance business, but that he was a house salesman, did you believe at that time that he could guarantee to sell the equity that you had in a contract for any particular sum?

A. Yes, we took his word for it.

Q. Now, Mr. Welchman, as a man familiar with the building trade let me state my question carefully again to you—This is a court proceeding, under oath.

Did you believe at that time that this defendant real estate salesman could guarantee to you to sell the equity that you had in a contract for any particular or specified sum?

A. Yes, it being the fact that at the time I knew nothing about the contracts, I took his word for it, yes.

Q. You believed, then, that this real estate salesman could guarantee to you a certain sum?

A. *He did guarantee to me a certain sum.*

Q. And you believed he could get that exact sum for the contract?

A. A few hundred either way, I wouldn't have cared.

Q. You did not then *believe* that he could get a certain sum—I mean, the exact sum you have testified, $4,000, — did you believe he could get that sum?

A. That is the figure he said to me."

As Carter did not manifest his intention ambiguously, plaintiff Arnell Welchman's belief that he might get "a few hundred either way" is immaterial. Restatement of Contracts, §233.

If, notwithstanding the foregoing, the oral agreement is held to be void or unenforceable, are defendants entitled to retain the commission paid by plaintiffs?

The Restatement of Contracts provides:

"§468. *Rights of Restitution*:

"(2) Except where a contract clearly provides otherwise, a party thereto who has rendered performance for which the other party is excused by impossibility from rendering the agreed exchange, can get judgment for the value of what he has rendered, less the value of what he has received, unless what he has rendered can be and is returned to him in specie within a reasonable time."

"Comment on Subsection (2):

"b. This Subsection states the rule where the plaintiff's performance is not excused by impossibility. The plaintiff may have performed only in part or he may have fully performed. In either case the defendant's duty to render return performance has been excused by impossibility or by the frustration of the object of the contract. The rule governing the discharge of one party to a bilateral contract where the other party fails to perform, whether that failure is due to impossibility or to misconduct is stated in §274. . . .

§274. *Failure of Consideration as a Discharge of Duty*

"(1) In promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional. An immaterial failure does not operate as such a discharge.

"(2) The rule of Subsection (1) is applicable though the failure of performance is not a violation of legal duty.

"Comment:

"a. The reason for the rules in this and the following sections of this Topic is failure of consideration. Failure of consideration is a generic expression covering every case where an exchange of values is to be made and the exchange does not take place, either because of the fault of a party *or without his fault.* In any such case a party who has not himself caused the failure of consideration by a breach of duty, may refrain from giving any part of the exchange, which he has not yet given, *and generally may reclaim what he has given, or its value.*

"b. *Consideration,* as used in the phrase, failure of consideration, *means merely an exchange in fact agreed upon. Failure of consideration, therefore, is failure to receive such an exchange. In the formation of contracts, consideration is the exchange for a promise* (§75). In the present connection the consideration in question is the promised performance of one party agreed to be exchanged for that of the other.

"Comment on Subsection (2):

"c. The law excuses a contracting party from performing his promise for a variety of reasons — infancy, insanity, impossibility caused in certain ways; *but however blameless* in law and fact a party to a contract may be in failing to perform his promise, *if he does fail he should not have what is promised in exchange for his performance.*"

To the same effect, see Williston on Contracts, supra, §1969 and following.

It is not enough that plaintiffs here received some legal consideration in return for their promises and acts, if they did not receive the consideration bargained for and promised, without the promise of which they would have made no contract at all, either with defendants or with Granger's. (D. 37).

CONCLUSION

There is ample support in the record to establish a case that will survive a motion for summary judgment.

A new contract was entered into by the parties on April 28, 1956, which modified and, to the extent of such modification, replaced the original written contract of March 8, 1956.

Such new agreement conferred enforceable contractual rights upon plaintiffs, notwithstanding the statute of frauds, for several, independent, reasons, to-wit:

(1) All provisions within the statute were fully executed.

(2) Plaintiffs made and fully performed the oral modification, pursuant to defendants' representations and inducements, materially and irrevocably changing their position thereby, and thereby conferring upon defendants benefits to which they otherwise would not have been entitled.

(3) Defendants are estopped to assert the statute.

The risk of impossibility of performance by defendants was expressly assumed by them. The agreement was not discharged thereby.

In fact and law, plaintiffs are entitled to damages for breach of contract.

But, in any event, they are, at the least, entitled to restitution of the commission they paid to defendants.

We respectfully submit that the summary judgment should be vacated.

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